COLUMBIA LAW REVIEW

VOL. XXII JANUARY, 1922 NO. 1

THE LAW AND THE FACTS

The delusive simplicity of the distinction between questions of law and questions of fact has been found a will-of-the-wisp by travellers approaching it from several directions.[1] To understand the origin as well as the persistence of the notion, one must glance into the medieval mind from which we have inherited the logic illustrated in the distinction. To understand the dissatisfaction with the distinction that confronts us today, one must study the history of improvements in the fact-finding machinery available in the administration of justice.

The syllogism is not held in very high repute today. The modern mind is prone to suspect that nothing can be drawn out of the magician's hat or the logician's major premise that has not been surreptitiously put into it. The difference between the old school men and ourselves is not so much in the conclusions we reach nor in the actual processes by which we reach them as in the particular spot where we seek to cover up the fallibility of the human mind. The medieval logician made a generalization on insufficient data, after which his reasoning followed without a flaw. We leave out the generalization, and frankly argue by the faulty method of analogy; but just because we know the shortcomings of the method, we are inclined to be more particular about our matter. The

[1] In a recent article entitled *Statements of Fact in Pleading under the Codes* (1921) 21 COLUMBIA LAW REV. 416, Professor Walter Wheeler Cook has shown that there is no generic difference between statements of fact and conclusions of law. In an article on *Judicial Review of Administrative Findings* (1921) 30 Yale Law Journ. 781, the present writer has indicated that courts view a whole series of typical questions almost arbitrarily as questions of law, of fact, or of discretion, and put forward their views as a basis for granting or refusing judicial review of the administrative findings. The classical discussion of law and fact in the English language, the fifth chapter in Thayer, *Preliminary Treatise on the Law of Evidence* (1898) is entitled "Law and Fact in Jury Trials." It leaves no doubt of the difficulty of drawing a line between the two types of questions. Other discussions, in which the absence of a difference between the two types of questions is found to make the book-rules utterly useless in the really difficult cases, are those connected with mistake of law and mistake of fact, and misrepresentations of law and misrepresentations of fact. *Cf.* Professor Woodward, (1905) 5 COLUMBIA LAW REV. 366; also Truman P. Young, *A Critical Analysis of the Law as to Mistake and Its Effect upon Contracts* (1904) 38 American Law Rev. 334.

medieval naturalist, for example, could say *"Omnis vita ex ovo,"* though he knew a great deal less about it than we do. With this universal proposition he could proceed to prove either that something was an egg or that something else was not alive. We have not the universal affirmative proposition, but we are quite willing to analogize from one form of living matter to another. Of course we cannot have the faith in our conclusions that the medieval philosopher enjoyed. But is not the real difference this: that until the end of the eighteenth century people believed in generalizations for their own sake? The nineteenth century has, of course, made its own generalizations—evolution, for example—but it has insisted on observation as the basis of generalization and has reserved the right to alter, amend or repeal all generalizations in accordance with the facts found from time to time.

There is one connection, however, in which the syllogism seems to retain its hold, possibly because the type of reasoning involved here was developed under the unconscious influence of the medieval logicians. I refer to the legal reasoning in which propositions of law are contrasted with propositions of fact very much as major premises are contrasted with minor premises, and in which conclusions are drawn by the very same process. Theoretically, the court knows all of those major premises which constitute the law. The jury is asked to tell the truth with reference to the minor premise, the fact of a particular case. Then the conclusion is supposed to take care of itself.

Of course, as Professor James Bradley Thayer in his classical chapter on "Law and Fact in Jury Trials" has made abundantly clear, Coke's Latin maxim which assigns questions of law to the judge and questions of fact to the jury is neither universally true nor, even where it is true, capable of exact application. Yet as a working proposition, it still stands among the first learned by the Freshman in his course in Pleading and absorbed by the layman in his course of service as a juryman or witness. With this proposition goes the assumption that questions of law and of fact are generically different, though there may be a borderland in which so-called mixed questions of law and fact are met. Professor Thayer's account was purposely limited to the situation created by our jury system. The subject matter thus defined is properly one of tremendous importance in a preliminary treatise on the law of evidence. And whether the distinctions under it are sound or not, it is decidedly concrete. Approaching the distinction of law and fact from the same point of view some years later, Dean Wigmore said:

" . . . the popular distinction between 'fact' and 'law' is here as accurate as the situation requires. The requirement is for phrases which shall set off in one class the rule that in this or that instance the State sanctions and will habitually enforce a legal relation of a specific content, and in another class the fact constituting the contingency in which the State predicates this relation. In the former class we are dealing with

the general body of legal principles; in the latter, with all other phenomena, so far as they may come within the purview of the law." [2]

When we approach the distinction from any other angle or for any other purpose, it is by no means so clear what is law and what is fact. Thus, in his discussion of this distinction, Professor Salmond suggests that what is today a question of fact may be a question of law tomorrow by the simple operation of the doctrine of *stare decisis:*

"The point in issue," says he by way of illustration, "is the meaning of a particular clause in an Act of Parliament. Whether this is a question of fact or of law, depends on whether the clause has already been the subject of authoritative judicial interpretation. If not, it is one of fact for the opinion of the court. If, however, there has already been a decision on the point, the question is one of law to be decided in accordance with the previous determination. The conclusion may seem paradoxical that a question of statutory interpretation may be one of fact, but a little consideration will show that the statement is correct. It is true, indeed, that the question is one as to what the law is, but a question of law does not mean one as to what the law is, but one to be determined in accordance with a rule of law." [3]

Needless to say, our basis of distinguishing between conclusions of law and propositions of fact will depend in large measure on our definition of law. Of course under any set of definitions some things will more or less readily fall on the side of law, some on the side of fact, and some in between. But the common law has not worked with any preconceived definitions. Such classification as it has made has been blundered into on the basis of procedure. One thing is clear, that whatever definition of law we adopt, there is a large and growing group of facts that tend to be dealt with as matters of law after courts have had a large experience with them in the course of which a uniform line of decisions on the facts has developed. The classical instance, of course, is the work of Lord Mansfield in converting the questions of the customs of merchants into questions of law that needed no jury for their determination after the conclusive work of his famous special jury of merchants. There may, indeed, be no single instance in the law of the last century that will compare with this part of Mansfield's work, but in a small way this very thing is constantly being done and citations could be multiplied in which courts either say or intimate that a particular question is "no longer" a question of fact. There are, perhaps, a greater number of instances in which courts, without being conscious of any deviation from the past, begin to deal with old questions of fact as questions of law. This process is helped by the ease with which, under our system of citing cases, it is possible to find a case similar in fact to the case before us. The authority or precedent can be cited without a very keen analysis, in fact without

[2] *A Treatise on the System of Evidence in Trials of Common Law* (1904) § 1.
[3] Salmond, *Jurisprudence* (6th ed. 1920) 16.

any attempt to separate the fact from the law. A proposition is decided by the court quite correctly under the facts of a given case. It bobs up in the digest as a point of law, and soon it is cited and re-cited in decisions and textbooks until it is quite indistinguishable from any other proposition of law. What was a question of fact becomes a question of law because the court becomes acquainted with the fact. As Professor Beale has somewhat laconically said, "The law is what the court knows." [4]

Most of the discussions that seem to turn on the point whether a question is one of law or of fact are really discussions of the respective provinces of judge and jury which, as Thayer has shown for all time, is quite a different question. A great deal of confusion would be avoided if we frankly used some such expression as "judicial questions" and "jury questions" in this connection instead of questions of law and of fact. But as matters stand, two sets of distinctions have been confused to such an extent that whether a jury is involved or not, we are categorically told that judicial questions are questions of law, and results are more or less mechanically worked out from this assumption. Let us consider then a few of the types of questions which, on the basis of our jury system, are said to be law questions. Even assuming the criterion quoted above from Professor Wigmore, it is not always obvious whether we are dealing with "facts constituting the contingency" or the relations which the state predicates on their basis.[5] Thus we are told that a question of foreign law constitutes a question of fact.[6] There are various ways of wording this. We may, of course, say that our law predicates that if the foreign law creates a right, that right shall exist.

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[4] *Cf. Treatise on Conflict of Laws* (advance sheets) § 118.

[5] Over fifty pages of fine print (1800-1853) in the Index and Concordance to the Cyclopedia of Law and Procedure are devoted to the heading, "Question of Law or Fact." In these almost every article of importance in the entire Cyclopedia is referred to. Likewise, in a similar descriptive word index to the Decennial and all Key Number Digests issued by West Publishing Co., the same heading covers seven pages. In a certain sense, the very existence of these, and of their extreme usefulness there can be no doubt, is due to the necessity of indexing much of our so-called law under "fact" headings in order to be able to index it at all. A very considerable number of the titles to the articles in our encyclopedias of law and digests is made up of words and phrases descriptive of particular things rather than of legal concepts. See, for example, the list in 16 Corp. Jur. VII-IX, where, along with such titles as "Abatement and Revival," "Appeal and Error," "Agency," and the like, will be found the more concrete expressions, "Aërial Navigation," "Agriculture," "Aliens," "Animals," "Apprentices," "Architects," "Asylums," "Auctions and Auctioneers"—not to stray out of the bounds of the letter "a." In like manner, the number of books in Anglo-American law on particular sets of facts is exceedingly great. Besides the treatises of Ram and Moore, there are innumerable others devoted to such subjects as the laws of horses, of automobiles, of street railways, of labor, of fences, and to similar subjects cutting across all of the traditional fields into which law had formerly been divided by forms of procedure. Law school curricula include several subjects in which the unifying element is one of fact rather than of law, for example, courses on insurance, business, labor, "legal liability," carriers, and the like.

[6] A more accurate statement is that of *Alexander* v. *Pennsylvania Co.* (1891) 48 Ohio St. 623, 30 N. E. 69, to the effect that where decisions of another state are given in evidence, it is for the jury to determine whether or not the decisions have been made, and for the court to construe the rules of law which they establish.

On the other hand, there is a school which insists that the local law adopts the rule of the foreign law in certain cases and makes it its own for those purposes. Another illustration: It is frequently said that a question of law always arises at the close of the evidence in any case whether or not there is any substantial proof warranting a verdict in favor of the plaintiff.[7] Likewise it is sometimes said that the question whether there is any conflict of evidence is a question of law.[8] Again, it is said that the construction of documents or writings in evidence is a question of law.[9] And the same is said of the construction of words of mouth when once the uttering of these words is established. The question of reasonableness of time has generally been held a jury question. Yet where there are no facts in dispute, courts have frequently attempted to deal with it as matter of law.[10] Likewise the reasonableness of the rules adopted by a carrier has been held a matter of law.[11] Among doubtful questions that have been held matter of law in one case or another are: the measure of a landlord's duty to a tenant who has abandoned the premises;[12] the duties of a carrier;[13] whether statements claimed to be part of the *res gestae* were such;[14] the location of the boundary line between two counties.[15] And the following have been held matters of fact: whether an instrument was properly stamped or duly delivered;[16] whether an owner of property lost title by abandonment;[17] whether an act was done under particular orders;[18] whether a certain custom existed;[19] waiver;[20] possession;[21] title;[22] existence of a highway;[23] private boundaries.[24]

[7] *Cf. Crookston Lumber Co.* v. *Boutin* (C. C. A. 1906) 149 Fed. 680, 685. The court says: "It is a well settled rule, recognized by the courts of the United States, that a question of law always arises at the close of the evidence in any case, whether there is any substantive proof warranting a verdict in favor of the plaintiff." *Cf.* also *Ralston* v. *Transit Co.* (1920) 267 Pa. St. 257, 110 Atl. 329.

[8] *Chamblis* v. *Mary Lee Coal, etc. Co.* (1894) 104 Ala. 655, 16 So. 572.

[9] *Cf.* 38 Cyc. 1522 and cases cited.

[10] *Williams* v. *Powell* (1869) 101 Mass. 467; *Rosengarten* v. *Delaware, etc. R. Co.* (1908) 77 N. J. L. 71, 71 Atl. 35; *Wright* v. *Bank of the Metropolis* (1888) 110 N. Y. 237, 18 N. E. 79.

[11] *South Fla. R. Co.* v. *Rhoades* (1889) 25 Fla. 40, 5 So. 633.

[12] *Woodbury* v. *Print* (1908) 198 Mass. 1, 84 N. E. 441.

[13] *Madden* v. *Port Royal, etc. R. Co.* (1894) 41 S. C. 440, 19 S. E. 951.

[14] *Southern Ry. Co.* v. *Brown* (1906) 126 Ga. 1, 54 S. E. 911.

[15] *State* v. *Thompson* (1892) 85 Me. 189, 27 Atl. 97; *Hecker* v. *Sterling* (1860) 36 Pa. St. 423.

[16] *Alexander & Howell* v. *Leith* (1869) 39 Ga. 180.

[17] *Johnson* v. *Dooly* (1887) 80 Ga. 307, 7 S. E. 225.

[18] *Brakebill* v. *Leonard* (1869) 40 Ga. 60.

[19] *Branch, Sons & Co.* v. *Palmer* (1880) 65 Ga. 210; *Western* v. *Page* (1896) 94 Wis. 251, 68 N. W. 1003; *contra, Nolte* v. *Hill* (1877) 7 Ohio Dec. (reprint) 297, reversed on other grounds (1880) 36 Ohio St. 186.

[20] *Minor* v. *Edwards* (1848) 12 Mo. 137; *Ball Electric Light Co.* v. *Sanderson Bros. Steel Co.* (1891) 60 Hun 576, 14 N. Y. Supp. 429; *Mullan* v. *United States* (1907) 42 Ct. Cl. 157; *Hooe & Herbert* v. *United States* (1906) 41 Ct. Cl. 378.

[21] *Burgess, etc. of New Windsor* v. *Stocksdale* (1902) 95 Md. 196, 52 Atl. 596; *Kinney* v. *Ferguson* (1894) 101 Mich. 178, 59 N. W. 401; *Willard* v. *Meeks* (1896) 59 N. J. L. 56, 35 Atl. 455.

[22] *Grove* v. *McAlevy* (1887) 5 Pa. Super. Ct. 124, 8 Atl. 210.

[23] *Cortelyou* v. *VanBrundt* (N. Y. 1807) 2 Johns. 357.

[24] *Enterprise Transit Co.* v. *Hazelwood Oil Co.* (1902) 20 Pa. Super. Ct. 127; *Reilly* v. *Howe* (1898) 101 Wis. 108, 76 N. W. 1114.

Doubtful as some of these decisions may be, they are yet clear in the connection in which they first arose, the determination of the province of the jury. If this were the only connection in which it ever became necessary to distinguish between law and fact, the matter would present no difficulty except a practical one for which the middle ages did not feel the same necessity of providing that we do; namely of informing the court on questions of fact left to its determination. Where the court's major premises are scientific propositions, it is a little unfortunate that the only regular mode provided for the use of these generalizations is the citation of past decisions where there are any, or the court's "general information" where there are none. Our fatal habit of assuming that the court is not concerned with questions of fact has developed a procedure in which there is no direct, legitimate way of informing the judge of facts. Whether logically sound or not, the effect in fact of arrogating to the court the power of determining a certain proposition as one of law is to limit the possibility of scientific investigation, especially in connection with those general facts which, by their nature, require a great degree of care and special training for their adequate determination outside of the law court. When a court has once decided, for example, that there is nothing in a particular business to warrant special legislation with reference to it, there is very little opportunity of undoing its work. The result is this paradox: that some questions are to be resolved in court not in accordance with the actual facts, not in an effort to ascertain the truth or falsity of a proposition, but by a wholly mechanical resort to the digest. A constructive or fictitious truth is rendered unchallengeable. Of course, the need of settling controversies somehow is more pressing than the need of abstract justice or accuracy. Consequently, at some point the law must draw a line and say that some sort of ascertainment shall pass for the truth. Thus, even in connection with the visible and tangible facts of a particular case, it is a constructive truth—the verdict of a jury or the findings of some other tribunal subject to certain more or less arbitrary rules of evidence—that must pass as the unchallengeable truth. The difference is only in degree, and the only criticism that can be offered against any particular mode of deciding any question of fact is that the arbitrary line is drawn back too far from the realm of realities.

Theoretically, the need of the court for information as to general facts is taken care of by the doctrine of judicial notice. What the court is presumed to know, a lawyer may tell it, and very little formality need be resorted to in this process of theoretically reminding the court of what it already knows. But this very fiction of judicial notice is based on a medieval conception of learning. The learned man of the middle ages was supposed to be skilled, and probably was skilled, in all of the Seven Sciences. The entire amount of the world's information could

have been compressed in a very few volumes, and, as a matter of fact, there were many men who, with apparent success, made all knowledge their particular province. This conception of a learned man is, of course, entirely abandoned today. Consequently, the doctrine of judicial notice does not quite fit the needs of modern life. In the first place, some of the general facts needed in the decision of technical questions are so highly complicated that it is hopeless to expect to instruct even the most intelligent judge in the course of a single case to the extent necessary to enable him to come to an accurate conclusion. At least, if the court is not made up of specialists, it ought to have the aid of special investigators capable of subjecting the evidence on general facts so loosely presented in the lawyer's argument to the same degree of scrutiny that the far less important and less difficult special facts are subjected to when they are presented to a jury. The difficulty is that there is no method provided in our law, officially, for the instruction of a court in the facts and principles of economics, social science, politics, history, or any of the other fields whose facts are subjects of judicial notice. It is no escape from this difficulty to limit the function of a court so as to free it from the necessity of deciding general questions of fact. It is true that the legislature is frequently better equipped for this work than the court, and that courts should therefore indulge in the presumption that the legislative conclusion on such subjects is correct. But many of these questions of a general nature cannot be dismissed in that way for the simple reason that no legislative finding is clearly set forth by the legislature—in fact, no legislative finding may be involved. Courts are constantly called upon, for example, to determine the meaning of a contract made in a particular business on the basis of the general facts of that business or of business in general.

Passing, however, from the difficulty of keeping the court informed on facts on which it must pass, there are other connections in which it becomes of vital importance in the course of a decision to determine whether a particular question is one of law or fact. For example, in the law of pleading, in the relations between the court and administrative tribunals and in the substantive law as to mistakes and misrepresentations.

Historically the distinction between law and facts that our courts have made has been based on procedure. A distinction which came to fit particularly well the needs of dividing functions between court and jury would necessarily serve fairly well in a system of pleading which had for its main function to formulate issues for the court or the jury. It was only natural to transfer the habits of mind that grew up under this distinction even to the realm of code pleading and possibly to the more or less factless types of pleading, though the connection between allegations of fact and jury issues became dimmer. It is really this blind

transfer, carried out behind the fiction of a generic difference between statements of fact and conclusions of law that Professor Cook has objected to.[25] But what shall we say when the lawyer's habit of mind to call certain propositions facts and others law on historical rather than logical grounds is transferred to the realm of administrative law and roughly made the basis of a division of function between courts and commissioners? This seems to be, however, the psychological explanation of what has taken place.

In the growth of commissions and other administrative tribunals entrusted with the determination of questions of fact, the question is sometimes raised whether a particular proposition passed upon by such a tribunal is one of law or one of fact. While there are a few decisions reluctantly granting to the administrative body finality in matters of law entrusted to it,[26] there are numerous decisions to the effect that courts will not revise conclusions of fact properly reached by the proper tribunal.[27] As a matter of history courts have been dealing with particular questions as if they were at once matters of fact, law, discretion, or any one of them that best suited the needs of the moment. Thus, in connection with judicial review of administrative findings, they have held the question of whether a particular thing constituted a nuisance to be a mere question of fact or a question of discretion where they refused to entertain any review, and again have insisted that it was primarily a question of law where they felt that a review was proper.[28] Careful analysis would, in most instances, show that points of all kinds were involved in almost every decision. Thus, in determining what is a nuisance, a legal definition of a nuisance clearly involves propositions of law. Perhaps it did not when the word was first borrowed from ordinary language, but it can hardly be contended now that the expression is free from technical connotation. At the same time there are questions of fact involved with reference to the particular thing under consideration. True, these questions may not involve much difficulty; the facts may be admitted, or they may be obvious to the senses. The real difficulty is likely to come in connection with the more generalized facts, the kind involving more or less expert information with reference to things that cannot be foreclosed by any pronouncement of the court. Thus, with reference to the smoke nuisance, there are questions of public health involved, questions with reference to engineering possibilities and public needs and even of general history. In addition, there are questions which can hardly be called questions of right and wrong. At most they involve better or worse. Such questions may well be spoken of as questions of discretion. To say, as courts frequently do, that whether

[25] Cook, *loc. cit.*
[26] See Hall, *Cases on Constitutional Law* (1913) 288n.
[27] *Ibid.*
[28] *Cf. Judicial Review of Administrative Findings, supra,* footnote 1.

a particular thing is a nuisance is a question of one type or another is to forget properly to narrow the issue. Add to this the consideration that commissions do not ordinarily make separate findings of law and fact, or indeed any findings separate from their final decrees, and the further difficulty that some of their hardest questions—for example, rate-fixing and valuation—are questions with which neither courts nor juries are accustomed to deal, and there is laid open a fruitful source of the difficulty that arises when one tries to mark off the province of the court on the basis of the old judge and jury functions.

When we come to the necessity of distinguishing between questions of law and questions of fact in substantive law, for example in the matter of mistake or in the law of representations and warranties, it is not surprising to find the ghost of the old procedural basis of a rough distinction between law and fact in our path. Perhaps if there had not been such a delusion in the minds of lawyers, the unfortunate doctrine of *Bilbie* v. *Lumley*[29] would not have passed so readily into our law, and courts would have been more ready to relieve against a mistake of law. Incidentally, it would have been unnecessary for them to escape the doctrine by inventing distinctions between mistakes of law and ignorance of law, mistakes of public law and of private rights, mistakes in choice of terms and mistakes in substance, mistakes of law and mistakes as to the legal effect of a law, and so on throughout the whole struggle to escape from the rigor and apparent injustice of the doctrine that courts will not relieve against mistakes of law. It is true that courts have attempted to call all kinds of mistakes mistakes of fact rather than mistakes of law because of the palpable injustice of this rule. Thus a mistake as to one's antecedent legal rights, a mistake as to a man's private rights clearly involving matters of law, the legal effect of one's contracts, and a host of other mistakes of law have been classified by courts as analogous to, if not identical with, mistakes of fact. Nevertheless, we are told in this connection that the construction of words is a matter of law.[30] In other words, what we always have been accustomed to consider beyond the ken or beyond the ability of the jury, they glibly speak of as matters of law, even though the result of this is so ridiculous as to say one cannot be relieved against one's mistake in misconstruing a word.

The same is true of fraud, which really presents a variety of mistake. It is generally held that statements of domestic law, though false

[29] (1802) 2 East 469.

[30] *Purvines* v. *Harrison* (1894) 151 Ill. 219, 37 N. E. 705; *Midland G. W. Ry.* v. *Johnson* (1858) 6 H. L. Cas. 798; *Sibert* v. *McAvoy* (1853) 15 Ill. 106; *Gordere* v. *Downing* (1857) 18 Ill. 492; *Wilding* v. *Sanderson* [1897] 2 Ch. 537; *Oswald* v. *Sproehnle* (1885) 16 Ill. App. 368; *Cochran* v. *Pew* (1893) 159 Pa. St. 184, 28 Atl. 219; *Woolworth* v. *McPherson* (C. C. 1893) 55 Fed. 558, in contracts; as to the construction of a will, *Keitt* v. *Andrews* (S. C. 1852) 4 Rich. Eq. 349; *Kunkel* v. *Kunkel* (1920) 267 Pa. St. 163, 110 Atl. 73; and as to a deed, *Rushton* v. *Hallett* (1892) 8 Utah 277, 30 Pac. 1014. See note in 28 L. R. A. (N. S.) 799.

and fraudulent, do not constitute actionable fraud. "And on this principle, a conscious misstatement of the meaning of certain terms in a written contract has been held immaterial." [31] Where the alleged fraudulent representations were in substance statements of the effect of a contract and of the defendant's rights thereunder, the court held that "they were not such false representations of existing material facts as to avoid the contract." [32] In another case, it was held error to permit testimony as to an agent's explanation of the meaning of a clause in a contract as to terms of payment.[33]

In the application of this principle, a little confusion results from the tendency of the courts to doubt whether the alleged victim of a fraud has actually relied upon the misrepresentation of the state of the law. Almost invariably after stating that a misrepresentation of law cannot constitute fraud, the courts proceed to say that besides one does not ordinarily rely upon another's representations as to law. All this may be true, and yet when those representations are as to the validity of a patent [34] or as to the freedom of certain stock from assessments,[35] or as to the effect of a license with reference to leased premises,[36] or as to whether there was any community property owned by a husband and wife,[37] it is obvious that the court is labelling these questions as questions of law, and mechanically excluding them on the theory that fraud has to do with misrepresentation of facts. In all of these cases, it is quite true that it would be obnoxious to the traditions of pleading, and objectionable in view of our jury system, to treat such statements as statements of fact, but whether they constitute a possible basis of fraud as a misrepresentation of the state of things actually in existence, it is submitted, is quite a different question.

In the law of warranties, as in the law of fraud, the expression "affirmation of fact" figures prominently. According to § 12 of the Uniform Sales Act, such an affirmation by the seller relating to goods is an express warranty if its natural tendency is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No statement purporting to be a statement of the seller's opinion only is to be construed as a warranty. Presumably, no affirmation of law or of a conclusion of law can be construed as a warranty. And yet, in the very next section in the discussion of *implied* warranties of title, a series of propositions is enumerated which might reasonably be looked upon as propositions involving conclusions of law. For example, there is the implied warranty on the part of the seller that he has a "right to sell

[31] 3 Williston, *Contracts* (1920) § 1495, and cases cited.
[32] *Tradesmen Co.* v. *Superior Mfg. Co.* (1907) 147 Mich. 702, 111 N. W. 343, 112 N. W. 708.
[33] *Providence Jewelry Co.* v. *Bailey* (1909) 159 Mich. 285, 123 N. W. 1117.
[34] *Cf. Reeves* v. *Corning* (1892) 51 Fed. 774.
[35] *Upton* v. *Tribilcock* (1875) 91 U. S. 45.
[36] *Gormely* v. *Gymnastic Association* (1882) 55 Wis. 350, 13 N. W. 242.
[37] *Champion* v. *Woods* (1889) 79 Cal. 17, 21 Pac. 534.

the goods" and another as to quiet possession against "any lawful claims existing at the time of the sale," and so on. Could such warranties be made expressly under the Code? Would they not be obnoxious to the terms of the definition limiting warranties to affirmations of *fact*?

Once dispel the illusion that there is a clear and easily discernible difference between propositions of law and propositions of fact, and you have laid bare, though by no means created, an endless source of difficulty where on the surface all had seemed serene.

As a matter of fact, under the influence of this old illusion, too many conclusions of fact and generalizations of fact have been taught as law. Too many judicial opinions have stated their conclusions under the particular facts of a case as propositions of law. Textbooks have grown bulky in recording these propositions, and the law has tended to grow mechanical as these propositions have been substituted for independent investigations in particular cases. The tendency is not limited to any one branch of the law. Take an illustration at random. Under certain conditions of postal management, in view of certain understandings of business men, certain cases at one time held that an acceptance of an offer by mail became effective as soon as the acceptance was mailed. It was a reasonable conclusion of fact in these cases that the mail was impliedly made the agency of the offeror. Yet follow this doctrine down through the digests and textbooks and later cases, and you find it established as a mechanical proposition of law that given a certain set of facts, an acceptance is complete upon being mailed.[38] It is needless to multiply examples. And there is not much use in reciting the particulars. It is one of the processes by which the common law has grown out of facts. For purposes of analysis, however, it is well to bear in mind the utter futility of the rough classification of questions as questions of law and of fact. At least it is necessary to remember that the classification is not one based on the nature of things but one based on a series of historical accidents. In other words, whether a particular question

[38] The after history of *Adams* v. *Lindsell* (1818) 1 B. & A. 681, is referred to. On the basis of this case has grown up the doctrine now uniformly held in America that if the acceptor is expressly or impliedly invited to use the post, the acceptance is complete when the letter of acceptance is mailed. Cases collected in Corbin, *Cases on Contracts* (1921) 42. The manner in which the question is answered as one of law, regardless of the fact of invitation to use the post, is illustrated in Gray, *C. J.'s,* opinion in *Lewis* v. *Browning* (1881) 130 Mass. 173, 175:

"In *M'Culloch* v. *Insurance Co.,* 1 Pick. 278, this court held that a contract made by mutual letters was not complete until the letter accepting the offer had been received by the person making the offer; and the correctness of that decision is maintained, upon an able and elaborate discussion of reasons and authorities, in Langd. Cont. (2d Ed.) 989-996. In England, New York, and New Jersey, and in the Supreme Court of the United States, the opposite view has prevailed, and the contract has been deemed to be completed as soon as the letter of acceptance has been put into the post office duly addressed. [Authorities cited]. But this case does not require a consideration of the *general question.*"

A change in fact, namely, that the post office regulations have permitted, at least since 1897, a letter to be reclaimed by the sender does not operate to change this rule. *McDonald* v. *Chemical Nat'l Bank* (1899) 174 U. S. 610, 19 Sup. Ct. 743. *Cf.* 9 A. L. R. 386n.

is to be treated as a question of law or a question of fact is not in itself a question of fact, but a highly artificial question of law.

Is there any principle discernible here? We may distinguish between judge and jury questions on historical and legal grounds, on the basis of precedent. We must distinguish between pleadable and non-pleadable statements on similar grounds. We may have to distinguish between the questions which one must answer in most states at one's peril and those on which one may dare to be mistaken or led by the representations of others, on the basis of what the court is presumed to know. We must work out a distinction between administrative and judicial questions on some independent but still purely practical grounds. But across all of these there will be found to run a series of cleavages dividing questions on which we can obtain the best answer through observation of particular facts, and questions in which more and ever more generalization is necessary. As to the former, some simple device for passing on facts is, of course, most desirable. The untrained jury has its place here. As questions pass more and more by degrees into the realm of theory, more trained bodies become necessary. The referee, or master in equity, is capable of handling more complicated situations than is the jury. The commissioner, or judge, by reason of his special training, is capable of bringing to bear on the situation not only a great power of generalization but also a great fund of opinion from which to generalize. We thus reach those generalized propositions which most of us think of as law. There is a sphere within which the highly trained legal expert is best capable of passing on the existence and meaning of a particular rule governing society. Beyond these questions there are others upon which it is more clearly impossible to reach a demonstrable conclusion. Many so-called questions of discretion or policy belong here. We do not ordinarily, in our system of government, consider it proper, or at all events advisable, to leave such questions to the judiciary. A branch of the government more directly answerable to the people is entrusted with them. The difference between judicial and non-judicial questions is thus one of degree. That is why it is so difficult to state in definite terms the objections which one may feel against using the judiciary in the settlement of industrial disputes or in other capacities in which it must work with principles of a more general nature than we are accustomed to think of as law. It is just as hard to explain why we object to courts or quasi-judicial bodies passing on particular facts in which the degree of generalization which we associate with courts is useless or even a hindrance. The true explanation is thus psychological and historical. The type of question we are accustomed to leave to courts we call law—what we are accustomed to leave to juries we call fact—what we prefer to decide ourselves we call discretion. There is more common sense than logic in the delimitations as they have come down to us.

To recapitulate: As practical conclusions from a refusal to be further deluded by the time-worn assumption that the distinction between law and fact is an obvious one in the nature of things, there stand out:

(1) Since the court decides many points not generically different from the facts decided by the jury, our procedure and arguments should be shaped to inform the courts directly and not merely through indirection or on the basis of medieval assumptions as to the omniscience of the learned man.

(2) Statutes should avoid reference to the distinction between law and fact as a simple one. Particularly statutes with reference to pleading in which statements of fact are expressly or impliedly contrasted with conclusions of law simply reintroduce under the guise of simplicity all the complexity of the oldest systems of pleading. It is advisable to clear up ambiguities as is done in several of our codes by such statements as that what is a reasonable time is a question of fact for the jury.

(3) In the law of mistake and representations (fraud and warranty) the undoubted tendency of the day to abolish the distinction between conclusions of law and propositions of fact is supported by the conclusion that we are not here dealing with a generic difference, but merely with a catalogue of questions placed in one column or the other on the basis of procedure.

(4) In marking out the province of the judiciary as against some of the newer types of tribunals, it may or may not be wise to give the new tribunals powers commensurate with those of the jury. It is proper, however, to know that we are indirectly accomplishing this end if we resort in this connection to a supposedly clear distinction between law and fact.

(5) In studying cases, in citing them, in teaching, text-writing, and abstracting, we must remember that not all that the court decides is "law," or at least generically different from fact to the extent that it is incapable of being checked and verified by ordinary observation of external facts or scientific study. The consummate lawyer is an artist in the realm of research. His training is not complete until he can be turned loose in a technical library or in a community with a reasonable prospect of success in the quest for accurate information, not only on legal principles but on questions of fact, whether those questions are concerned with architecture, or mining, or business customs, or anatomy, or chemistry, or social science, or any of the unlimited number of studies which take the place in the modern world of the medieval Seven Sciences.

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